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Issue Date: 23 March 2007

CASE NO.: 2005-LHC-2528
OWCP NO.: 01-161974

In the Matter of

R. S.[1]

Claimant

v.

ELECTRIC BOAT CORP
Employer/Self-Insured

APPEARANCES:

Stephen C. Embry, Esq., Embry & Neusner, Groton, Connecticut for the Claimant

Mark. P. McKenney, Esq., McKenney, Jeffrey & Quigley, Providence, Rhode Island for the Employer

BEFORE: COLLEEN A. GERAGHTY
Administrative Law Judge

DECISION AND ORDER AWARDING BENEFITS

I. Statement of the Case

The above captioned matter, a claim for workers' compensation benefits arising under the Longshore and Harbor Workers' Compensation Act, as amended, 33 U.S.C. § 901 *et seq.* (the "Act") was filed by R.S., the Claimant, against Electric Boat Corporation, the Employer ("EB" or "Employer"). After an informal conference before the District Director of the Department of Labor's Office of Workers' Compensation Programs ("OWCP"), the matter was referred to the

[1] In accordance with Claimant Name Policy which became effective on August 1, 2006, the Office of Administrative Law Judges uses a claimant's initials in published decisions in lieu of the claimant's full name. *See* Chief ALJ Memorandum dated July 3, 2006, available at http://www.oalj.dol.gov/PUBLIC/RULES_OF_PRACTICE/REFERENCES/MISCELLANEOUS/CLAIMANT_NAME_POLICY_PUBLIC_ANNOUNCEMENT.PDF.

Office of Administrative Law Judges for a formal hearing, which was conducted before the undersigned administrative law judge on April 25, 2006, in New London, Connecticut.

The Claimant appeared represented by counsel, and an appearance was made on behalf of the Employer. At the hearing, the parties were afforded the opportunity to present evidence and oral argument. Testimony was heard from the Claimant and from Michael Alu, Director of Operations at EB. The Hearing Transcript is referred to herein as ("TR"). Documentary evidence was admitted as Claimant's Exhibits ("CX") 1-5 and Employer's Exhibits ("EX") 1-3. TR 8-9, 91. Formal papers were admitted as Administrative Law Judge Exhibits ("ALJX") 1-9. TR 10-12. Thereafter, the parties filed post-hearing briefs, and the record is now closed.

After careful analysis of the evidence contained in the record, the parties' stipulations and their closing arguments, I have concluded that the Claimant is entitled to permanent total disability compensation benefits and medical care under the Act.

My findings of fact and conclusions of law are set forth below.

II. Stipulations and Issues Presented

At hearing, the parties stipulated to the following: (1) The Act applies to the present claim; (2) there was an employer/employee relationship at all relevant times: (3) the notice, claim and controversion were timely; (4) the informal conference was held on August 3, 2005; and (5) the average weekly wage was $2,146.32. TR 5-6.

The issues to be adjudicated include: (1) whether the injury arose out of and in the course of employment; (2) the nature and extent of disability.

III. Findings of Fact and Conclusions of Law

A. Claimant's Testimony

The Claimant was 58 years old at the time of the hearing. TR 27. He worked at Electric Boat from September 18, 1967 until February 26, 2005. TR 28. The Claimant stated that he began as a clerk and by 1971 had worked his way up to electronics technician, the highest rank for an hourly employee. TR 29. The Claimant looked to advance his career and in late 1971 or early 1972 he was promoted to a planner, a salaried management position. TR 30. He continued to progress and receive promotions and by approximately1979 he had risen to Planning Supervisor. *Id.*

In the early 1980s the Claimant was promoted to Chief of Planning and a year later to Superintendent of Electricians. TR 30. The Superintendent of Electricians was the highest ranking position he achieved or held at the shipyard during his employment. *Id.* As Superintendent his duties included managing and supervising two departments, the electrical and the electronic departments, which included 1000 employees. TR 30-32. The Claimant testified

that he found the superintendent job challenging and very rewarding and that during this period his day began at 5:00 a.m. and he worked until 7:00 or 8:00 p.m. racking up 800 hours of overtime. TR 35. The Claimant stated that he had progressed quickly up the ladder and acknowledged that he took great personal satisfaction in his achievement and in the recognition he received for his efforts. TR 36-37.

Sometime in the 1990s, the Claimant left the Superintendent of Electricians position and went to work in a newly created planning department working on a new class of submarine being developed called the Seawolf. TR 40-43. The Claimant took a lateral transfer to work on this project. TR 42. Two years into this project the Navy decided to cut back the program because of extensive cost overruns from an initial plan for 30 ships to two ships. As a result of the cutback, the Claimant and others who had gone to the new planning organization had to find other positions. TR 44. The Claimant was assigned to the Quonset Point facility to assist in construction of the two Seawolf submarines. *Id.* Specifically, he was to oversee construction of the engine room, all the major fabrication and installation of the engine room. TR 45. The Claimant found this position very challenging and rewarding. He worked on this project for three years in the mid 1990s. *Id.* He stated he was working approximately 75 hours per week during this period even though he was a salaried employee. TR 46. When the engine room section was ready the Claimant moved with it over to the Groton shipyard and worked on the final outfitting of the ship for eight months. TR 47.[2]

Once the Seawolf was ready for sea trials, the Claimant went to work on the next class of submarines, the Virginia class. TR 48-49. The Claimant was working with the electrical and electronics designers on the Virginia class in an effort to streamline the design so that the operations individuals building the ship could do so effectively and efficiently. TR 49. The Claimant's duties required him to travel and interface with government officials and officials from other companies. TR 50. The Claimant worked on this project for four to five years. TR 49. The work on the Virginia class did not require significant overtime and the Claimant generally worked 50 hours per week. *Id.* When the project was completed in 2001, he, along with other employees, had to find positions in other divisions of the company. TR 49.

The Claimant testified that he contacted the Director of Operations, Mike Alu, and had a discussion with the Director about his career goals, mentioning a position he thought he was exceptionally qualified for and which would be open soon because of an expected retirement by the current job-holder, Lew Marley. TR 50-51. Mr. Alu called the Claimant in October 2001 and asked him to act for the current second shift superintendent, Lew Marley, who was ill at the time. TR 51. The Claimant explained that the second shift superintendent job was very challenging because once the day shift ended and the director of operations went home, the second shift superintended was responsible for the entire shift, including schedules, budget and safety. The Claimant described the position as "in effect, the director of operations on second shift" and said he had wanted this job for five years TR 52-53.

Mr. Marley recovered and returned to work in one week's time. Mr. Alu asked the Claimant whether he wanted to return to first shift or stay on the second shift. TR 53. The

[2] On cross-examination the Claimant acknowledged that in this position he supervised fewer employees than he had as superintendent of electricians. TR 73.

Claimant wanted to stay on second shift. *Id.* The Claimant reports that Mr. Alu told him that there was currently a position open that was not up to his pay grade or abilities, but it would put him in a holding pattern until there was a position for him. *Id.* During this period, the Claimant reports that Mr. Marley showed him all of the tasks that Marley performed so he would learn all aspects of Marley's job. TR 54. According to the Claimant he was being groomed to take Mr. Marely's place when Marely retired. *Id.* During this eight month period, Mr. Marley became sick several times and the Claimant stepped in for him. TR 55. The Claimant stated that Mr. Alu asked Mr. Marley how the Claimant was doing and Marley replied in the Claimant's presence that the Claimant was "doing great." TR 56. The Claimant was evaluated during this period and received a score of one, which is the highest evaluation ranking possible. TR 62.

Mr. Marely announced his retirement eight months after the Claimant began working with him, although in the lower ranked position. TR 56. Interviews for Mr. Marley's position were conducted and the Claimant was not selected for the position. *Id.* The Claimant was devastated when he did not get the job. TR 57-58. He stated he was humiliated and had a hard time facing people he worked with as he had been training for the job and everyone expected him to get it. *Id.* The Claimant remained in the lower pay grade "holding" job for three years following the selection of Mr. Marley's replacement. TR 56, 58. He stated that he did not make waves and swallowed his pride, but could not understand why he had not been selected for the position. TR 58. In the lower pay grade job he was responsible for managing the employees constructing the engine room on the second Seawolf. TR 60. The Claimant stated he continued to go to work but his pride and professional reputation were hurt, as he was assigned to a position that he viewed as demeaning and beneath his abilities and capabilities. TR 61.

In January 2005, there was a change in management and a new Vice President arrived. TR 63. The new Vice President held a meeting with the management personnel and told them that to be successful the shipyard needed to have the right people with the right skills in the right places. TR 64-65. The Claimant left the meeting feeling rejuvenated and hopeful. *Id.* However, on February 14, 2005, the Claimant was called into his supervisor's office, and another supervisor was also present. TR 65-66. The Claimant was informed that a decision had been made to add a lead area superintended to coordinate the work the Claimant's group was performing inside the ship with the work the area superintended responsible for the outside of the ship was performing, and that the lead person was not the Claimant, but was Darryl Judish. TR 65-66. The Claimant said it felt as if someone "walked in there with a club and just smacked me right in the head." TR 66. The Claimant said that a lesser graded employee with no overhaul experience was given the assignment and would be over the Claimant. TR 66. After the meeting, the Claimant asked his supervisor how the person selected could be put above him and his supervisor told him he had nothing to do with it and that there was no recourse. TR 67. The Claimant said he was upset and did not sleep that night. *Id.*

The Claimant stated that the next day when word was out that a leadman was to be assigned, and Claimant hadn't gotten the assignment, he received e-mails from peers and subordinates expressing surprise. TR 68. He also reported that when he gave a direction to his subordinates, they replied "we're going to have to check with Darryl on that" or "does Darryl know you're going to do that" or "hey we better check with Darryl." TR 68-69. The Claimant stated he could not say, at the present time, that his coworkers were trying to be mean, but he

took it as them saying he had no authority and it reinforced his sense of demoralization, humiliation and worthlessness.

The Claimant reported that he could not eat or sleep for four days after the announcement. He called his physician on February 25 because he hadn't eaten or slept. TR 69. He was seen on February 28th and his physician sent him to the hospital for a work up. The Claimant has not returned to work as he was put on medication for hypertension, depression and anxiety which preclude employment. TR 71.

The Claimant relayed that prior to 2005 he was an avid golfer, had a boat, went to restaurants and had a normal life. TR 71-72. Since then he has not played golf, hasn't read a book, rarely leaves his home and has not engaged in any social activities. TR 72.

B. <u>Testimony of Michael Alu</u>

Michael Alu is the Director of Operations, and he has held that position since 2001. TR 96. He started work as a pipefitter at Electric Boat in 1970. *Id.* Mr. Alu stated that in 2005, the Claimant was working as the Area Superintendent Internal on the Springfield submarine. TR 97. According to Mr. Alu there was one management level, the Ship Manager who worked directly for him and the Claimant reported to the Ship Manager. *Id.* Mr. Alu agreed that up until 1991, the Claimant was supervising large numbers of employees. TR 98-99. However, after that time period the Claimant supervised far few numbers of employees. *Id.* Mr. Alu recalled that by 2005, the Claimant had cut back his hours and was not working much overtime. TR 99-100. The ship the Company was working on in 2005 was behind schedule and the ship manager who reported directly to Mr. Alu was ill and missed some work for treatments associated with his illness. TR 100, 102-105. As a result, Mr. Alu explained that additional management and hourly employees were brought in to work on the ship. TR 104-106. One of the additional management persons was Darryl Judish, who was brought in as second shift lead person to coordinate the work of the two area superintendents, one of whom was the Claimant. *Id.* Mr. Alu stated that the Claimant was not considered for the leadman position because he had been cutting back his hours and the position was a 10-12 hour a day job. TR 112-113. Mr. Alu reported that the leadman position was not an advertised position, and that Mr. Judish did not get a promotion when he took on the second shift leadman position, that it was a lateral role. TR 108. Mr. Alu also testified that, although Mr. Judish had responsibility for ensuring that the Claimant and the other area supervisor worked on priorities and he resolved any disagreements between the area superintendents over crane time, Mr. Alu did not view Mr. Judish as having a superior role to the Claimant. TR 110.

As for the superintendent position in 2001-2002, that the Claimant applied and was interviewed for when Mr. Marley retired, Mr. Alu agreed that he encouraged the Complainant to apply for the position. TR 125. However, he selected another individual he believed was the better candidate. Mr. Alu acknowledged telling the Claimant that he had the qualifications the company was looking for and the years of experience and that the company would go through the selection process. TR 128. Mr. Alu denied telling the Claimant that he would get the position. TR 126, 128-129.

C. Medical Evidence

1. *Robert Linden, M.D.*

Dr. Linden, a board certified internist, has been the Claimant's primary care physician since 1982. CX 1.; CX 3 at 5, 16. Prior to 2005, the primary focus of treatment was for hypertension and hypercholesterolemia which were managed with medication. CX 3 at 5. Dr. Linden saw the Claimant on February 28, 2005, at which time the Claimant indicated he was having problems at work. *Id.* Dr. Linden recalled that the Claimant complained that someone below him had been elevated above him and that he could not handle the situation, and as a result, the Claimant had been experiencing chest tightness, insomnia, nightmares and depression. CX 3 at 5. Because the Claimant's heart rate and blood pressure were significantly higher than the Claimant's normal values, Dr. Linden did an EKG. CX 3 at 6. Based on the EKG changes and the elevated heart rate and blood pressure, Dr. Linden sent the Claimant to the emergency room at Lawrence & Memorial Hospital for further workup. After completing the additional tests, Dr. Linden released the Claimant, but put him on an additional medication for hypertension, and started medication for depression and anxiety. CX 3 at 8-9.

The Claimant returned to Dr. Linden on March 7, 2005, and at that time was exhibiting reclusive symptoms, he had not been out of the house and had not talked to anyone at EB to discuss the problem. CX 3 at 9-10. Dr. Linden reviewed results of a stress test which was negative. CX 3 at 9-10. At this point, Dr. Linden also increased the anti-depressant medication and referred the Claimant to Dr. Reich, a psychiatrist. *Id.* Dr. Linden reports that Dr. Reich further increased the depression medication and added seroquel, an antipsychotic medication. CX 3 at 10-11.

The Claimant saw Dr. Linden again on June 14. At that time he was still experiencing some chest pain and tightness, which occurred when he was anxious. The chest pain was not accompanied by nausea, shortness of breath or sweats, leading Dr. Linden to attribute the chest pain to musculoskeletal pain from stress. TR 12. The Claimant continued to have hypertension. *Id.*

Dr. Linden opined that the Claimant's experience at work in which another employee had been elevated over him exaggerated his hypertension on a sustained basis and caused clinical depression. CX 3 at 13-16. Dr. Linden also stated that prior to this time the Claimant had never exhibited any psychiatric condition in the over twenty years he had been treating the Claimant. *Id.*

2. *Louis Reich, M.D.*

Louis Reich, M.D., is board certified in psychiatry. CX 4 at 6. Dr. Reich began treating the Claimant for symptoms of depression and anxiety on March 17, 2005, upon referral from Dr. Linden. CX 2; CX 4 at 7. The history as Dr. Reich understood was that the Claimant had worked at EB for 30-40 years, in a high position, which had contributed to the breakup of his marriage, and that he had been demoted in the last year or that another individual was given a job, and the Claimant had to report to that individual and thereafter subordinates questioned his

authority, leading to his psychiatric disorder. CX 4 at 7-9. Dr. Reich stated that the Claimant felt he had sacrificed his family life and marriage for EB. CX 4 at 10. Dr. Reich also reported that the Claimant feels worthless, has a sense of shame and believes that EB destroyed his life. CX 4 at 10-11. The Claimant has become agroraphobic, finding it difficult to socialize, to leave his home or to go into stores. *Id.* Dr. Reich explained that the Claimant's work was his life and he suffered a "major loss" when he was passed over. CX 4 at 11. Dr. Reich diagnosed the Claimant with major depression with traces of post-traumatic stress and anxiety. CX 4 at 11, 13. Dr. Reich also stated that the Claimant has an a obsessive compulsive personality, meaning he is inflexible and rigid. CX 4 at 11-12, 15-16. Dr. Recih explained that individuals possessing these personality traits are more likely to become depressed, and he thinks these traits have contributed to the Claimant's lack of resilience in overcoming his work-related disappointment. CX 4 at 15-16.

Dr. Reich explained that depression is a biological illness and the current view is that certain chemicals produced in the brain are not produced in sufficient quantity in individuals suffering from chronic depression. CX 4 at 14-15, 17-18. Dr. Reich stated that the Claimant has not responded to medication and he opined that he does not expect the Claimant to respond. CX 4 at 15.

Dr. Reich concluded that the stressors at the Claimant's work, including being passed over for the leadman position, being humiliated by co-workers who felt the Claimant no longer had the authority he used to have, and the Claimant's belief he was no longer appreciated by the Employer were directly responsible for his psychiatric illness. CX 4 at 16-17, 33-36. Dr. Reich stated that the Claimant is unable to work in light of his psychiatric condition and is totally disabled. CX 4 at 18-20. He stated that the Claimant reached maximum medical improvement certainly as of October 1, 2005. CX 4 at 18-19.

3. *Daniel Harrop, M.D.*

Daniel Harrop, M.D., is board certified in psychiatry, and examined the Claimant at the Employer's request on September 15, 2005. EX 2 at 2, 4. Dr. Harrop diagnosed major depression, with psychosis. EX 1 at 2. Dr. Harrop agreed with Dr. Reich that the Claimant was unable to work at that time, but he expected the Claimant would recover. EX 1 at 3. Dr. Harrop also opined that the Claimant's depression was not work-related. EX 2 at 12-13. Dr. Harrop explained his opinion by stating that the Claimant had experienced a number of losses over the years including loss of his family in 2002, there was also the situation where he did not get a promotion, but that the situation in 2005 did not involve a demotion as the Claimant was to remain in his same job at the same pay rate. So while the Claimant attributes his depression to the "demotion" in 2005, there is no relation between the two events. CX 2 at 13-14. While he acknowledged the Claimant may have physical symptoms as a result of his depression, Dr. Harrop concluded that because the depression was not work-related, neither was the hypertension that followed work-related. EX 2 at 14. Dr. Harrop stated he disagreed with Dr. Reich's opinion on causation because Dr. Reich's opinion was based on the erroneous belief that the Claimant was demoted in 2005. EX 2 at 16-17, 19. Dr. Harrop acknowledged however, that given the Claimant's need to be recognized for working hard, if the Claimant felt he was not being so recognized, it was possible that could be a source of stress. EX 2 at 26.

D. Causation

There is no dispute among the parties that the Claimant suffers from severe depression and anxiety. The dispute involves the question of whether or not the Claimant's illness was caused by his employment at EB.

An individual seeking benefits under the Act must, as an initial matter, establish that he suffered an "accidental injury…arising out of and in the course of employment." 33 U.S.C. § 902(2). *Bath Iron Works Corp. v. Brown*, 194 F.3d 1, 4 (1st Cir. 1999). In determining whether an injury arose out of and in the course of employment, the Claimant is assisted by Section 20(a) of the Act, which creates a presumption that a claim comes within its provisions. 33 U.S.C. § 920(a). The Claimant establishes a prima facie case by proving that he suffered some harm or pain and that working conditions existed which could have caused the harm. *Brown*, 194 F.3d at 4, *Merrill v. Todd Pacific Shipyards Corp*., 25 BRBS 140 (1991); *Murphy v. S.C.A./Shayne Brothers*, 7 BRBS 309 (1977) *aff'd mem.* 600 F.2d 280 (D.C. Cir. 1979); *Kelaita v. Triple A Mach. Shop*, 13 BRBS 326 (1981).[3] In presenting his case, the Claimant is not required to introduce affirmative evidence that the working conditions in fact caused his harm; rather, the Claimant must show that working conditions existed which could have caused his harm. *U.S. Industries/Federal Sheet Metal, Inc., v. Dir., OWCP (Riley)*, 455 U.S. 608 (1982). In establishing that an injury is work-related, the Claimant need not prove that the employment-related exposures were the predominant or sole cause of the injury. If the injury contributes to, combines with or aggravates a pre-existing disease or underlying condition, the entire resulting disability is compensable. *Independent Stevedore Co. v. O'Leary*, 357 F.2d 812 (9th Cir. 1966); *Rajotte v. General Dynamics Corp.*, 18 BRBS 85 (1986).

Once a claimant establishes a prima facie case, the Claimant has invoked the presumption, and the burden of proof shifts to employer to rebut it with substantial evidence proving the absence of or severing the connection between such harm and employment or working conditions. *Bath Iron Works Corp. v. Dir., OWCP, (Shorette)*, 109 F.3d 53 (1st Cir. 1997); *Merrill*, 25 BRBS at 144; *Parsons Corp. of California v. Dir., OWCP*, 619 F.2d 38 (9th Cir. 1980); *Butler v. District Parking Management Co*., 363 F. 2d 682 (D.C. Cir. 1966); *Kier v. Bethlehem Steel Corp*., 16 BRBS 128 (1984). Under the substantial evidence standard, an employer need not establish another agency of causation to rebut the presumption; it is sufficient if a physician unequivocally states to a reasonable degree of medical certainty that the harm suffered by the worker is not related to employment. *O'Kelley v. Dept. of the Army/NAF*, 34 BRBS 39, 41-42 (2000); *Kier*, 16 BRBS at 128. If the presumption is rebutted, it no longer controls, and the administrative law judge must weigh all the evidence and render a decision supported by substantial evidence. See *Del Vecchio v. Bowers*, 196 U.S. 280 (1935); *Holmes v. Universal Maritime Serv. Corp*., 29 BRBS 18 (1995); *Sprague v. Dir., OWCP*, 688 F. 2d 862 (1st Cir. 1982).

[3] As a general matter, a psychological injury which is work related is compensable under the Act. *Turner v. The Chesapeake & Potomac Telephone Co.*, 16 BRBS 255 (1984); *Dir. v. Potomac Electric Power Co.*, 607 F.2d 1378 (D.C. Cir. 1979).

In support of his prima facie case, the Claimant relies primarily on the medical opinions of his treating physicians, Dr. Linden and Dr. Reich, both of whom stated that the stress of being passed over for the leadman position in 2005 was a significant factor contributing to the Claimant's depression and anxiety. As the Claimant's primary care physician for over twenty years, Dr. Linden had treated the Claimant for hypertension, but had never noted or treated the Claimant for depression or anxiety prior to 2005. The Claimant testified credibly that his job at EB was very important to him, he derived a tremendous sense of accomplishment from his position, and he was stunned when he was not selected for promotion in 2002, but he continued to perform his job. The Claimant's testimony that, when he was not selected to serve as leadman in 2005, and was subjected to some teasing from subordinates, he felt humiliated and undervalued was credible. As a consequence of the 2005 event, he was unable to sleep, experienced nightmares, chest pain, and was unable to eat or to leave his home. Dr. Reich, his treating psychiatrist, reported that the Claimant felt he had given his life for EB, that he was no longer valued by the Company, and that he could not face teasing by subordinates who felt he did not have the same authority he held prior to the leadman being assigned.[4] Dr. Reich concluded that these events were the direct cause of the Claimant's depression and anxiety. Even the psychiatrist retained by the Employer, Dr. Harrop, agrees that the Claimant has major depression. The evidence establishes that the Claimant has a psychological injury and therefore, he has established harm, the first element of a prima facie case.

The Claimant must also establish that working conditions existed that could have caused the harm. Relying on the evidence discussed in the foregoing paragraph, the Claimant asserts that he has established that working conditions existed which could have contributed to his illness and under the accepted analytical framework that is sufficient to find that he has successfully invoked the Section 20(a) presumption of causation. Cl. Br. at 7-9. However, the Employer argues that the Claimant has not invoked the presumption because he has failed to show that work conditions existed which caused his psychological injury citing *Marino v. Navy Exchange*, 20 BRBS 166 (1988). EB Br. at 13-15.

In *Marino* the Benefits Review Board held, as a matter of law, that a psychological injury resulting solely from a legitimate personnel action, is not compensable under the Act. The claimant in *Marino* was informed of a pending reduction-in-force and alleged a psychological injury as a result. In so holding, the Board stated:

> …Such an event is not a working condition which can form the basis for a compensable injury. A legitimate personnel action or termination is not the type of activity intended to give rise to a worker's compensation claim. To hold otherwise would unfairly hinder employer in making legitimate personnel

[4] The Employer's contention that the Claimant was not "demoted" in 2005 when he was not chosen for the leadman position is true, as far as the term is understood from a human resources standpoint, as the Claimant did not experience a loss in pay or benefits. However, the leadman was assigned to coordinate activity between the Claimant and his counterpart working the outside of the ship because the ship construction was behind schedule. The leadman could overrule the Claimant's directions with regard to the priorities and scheduling of the work of the Claimant's unit with regard to use of the crane, or with welding or transportation support. TR 106-110. Under these circumstances, I find Mr. Alu's testimony that the leadman would not be viewed by the Claimant and others as having supervisory or higher authority than the Claimant unpersuasive.

> decisions and in conducting its business. Employer must be able to make decisions regarding layoffs without the concern that it will involve workmen's compensation remedies.

20 BRBS at 168.[5]

The Claimant argues that *Marino* is bad policy and bad law. Cl. Br. at 12, 14-17. The *Marino* decision is troubling. As the Claimant asserts, the decision introduces the element of fault to the workers' compensation system for psychological injuries. Cl. Br. 15, 17. Under *Marino*, an initial inquiry as to whether an Employer's personnel action was "legitimate" is required in cases of psychological injury. If the personnel action was legitimate then the psychological injury alleged to have resulted from the employer's action is not compensable, and presumably then, if the Employer's personnel action is not "legitimate" a resulting psychological injury is compensable. As a matter of policy, and in an effort to balance the concerns of employers over large negligence claims from injured employees, and the interests of employees in compensation for loss of wages and medical care, the workers compensation system was developed. The compromise underlying workers' compensation schemes, including the Longshore Act covering the maritime industry, required employers to accept liability without fault and employees were precluded from asserting claims for pain and suffering, and instead, were limited to recovery of lost of wages and medical care. Because *Marino* requires the Claimant alleging a psychological injury, resulting from a personnel action, to establish fault before he can obtain compensation benefits under the Act, *Marino* upsets the policy balance underlying the Longshore Act and appears inconsistent with the language of Section 4(b) of the Act, 33 U.S.C. § 904(b).

In addition, the Board's concern in *Marino* for an employer's ability to make business decisions without fear of encouraging workers' compensation claims seems overblown. It is unlikely that employees who are laid off or may be passed over for promotion will file trumped up psychological injury claims in response because there remains a stigma associated with mental injury, and because compensation benefits are less than what an employee could likely earn at a new job or by remaining employed with the employer. Moreover, employers have the same protection against fraudulent mental injury claims as they have against fraudulent physical injury claims. If the claim is not supported by medical records and opinions from physicians, the claim will fail.[6]

Nevertheless, I am bound by the Board's decision in *Marino*. However, the Board grappled with and relaxed the rule it established in *Marino* in *Sewell v. Noncommissioned Officers Open Mess, McCord Air Force Base*, 32 BRBS 127 (June 27, 1997); 32 BRBS 134

[5] The Board remanded the case to the administrative law judge with instructions to evaluate the claimant's alternative assertion that other work stresses, beyond those associated with the legitimate personnel action, including responsibility to "supervise a number of locations, insufficient personnel to perform the job, working more than the required hours number of hours and performing the duties of subordinates," contributed to the psychological injury. 20 BRBS at 168.

[6] The decision is also troubling in the sense that it suggests that psychological injuries are to be treated differently than physical injuries in analyzing an employee's entitlement to benefits under the Longshore Act. In doing so, it perpetuates the view that mental injuries are not as real or credible as physical injuries.

(April 18, 1998). In *Sewell*, the claimant filed a claim for a psychiatric injury, alleging she was subjected to harassment and eventually termination by her supervisor, which led to depression. In his initial decision, the administrative law judge found that the alleged harassment consisted of disciplinary actions taken by the supervisor and ultimately termination, which the judge determined to be "justifiable and legitimate personnel actions" under the circumstances before him. Decision and Order at 3. Therefore, the judge, relying on the Board's *Marino* decision, concluded that because the actions complained of were justifiable and legitimate personnel actions, the claimant failed to establish a prima facie case and he denied the claim for benefits.

On appeal, the Board affirmed *Marino's* holding that a legitimate personnel action does not provide a basis for finding a compensable psychological injury, but remanded the matter to the judge with instructions to address other evidence and to consider "whether, irrespective of the disciplinary and termination procedures, the cumulative stress of the claimant's general working conditions could have caused the claimant's psychological injury." BRB No. 89-1075 (slip op. at 3) (July 27, 1995) (unpublished). On remand, the administrative law judge concluded that the evidence did not establish that the cumulative stress of working conditions, including interactions with her supervisor, existed which could have caused the psychological condition, and he denied benefits.

On the second appeal to the Board, a majority of the Board criticized the judge's consideration of whether the employer's daily interactions with the claimant were legitimate or justified, stating that "when considering a claim based on stressful work conditions, the issue is not whether employer's actions were justified but whether, irrespective of the disciplinary and termination procedures, claimant's working conditions were stressful, *i.e.*, whether the claimant experienced cumulative stress in her general working conditions which could have caused or aggravated her psychological injury." 32 BRBS 127, 130 (June 27, 1997) (McGranery, J. dissenting). Applying this analytical standard, the Board majority concluded that the claimant had shown working conditions, irrespective of the disciplinary and termination proceedings, which could have caused the psychological injury. 32 BRBS at 131. Concluding that the claimant successfully invoked the presumption at Section 20(a) of the Act, the Board majority determined that the employer failed to rebut the presumption, and that, as there was no medical evidence showing that the psychological condition was not related, at least in part, to her work environment, the claimant was entitled to benefits. 32 BRBS at 132.

The Employer requested reconsideration asserting that the Board's decision was contrary to the *Marino* decision. In a split en banc decision, the Board affirmed its decision as being consistent with *Marino* stating that, like it had in *Marino*, the Board here discounted the disciplinary and termination proceedings as a basis for the stress-related claim, but found the evidence established the "existence of stress in [claimant's] daily work environment, specifically daily interactions with her supervisor." 32 BRBS 134, 136 (April 8, 1998) (McGranery and Brown, JJ. dissenting)[7]. In contrast, the dissent stated that as the judge found that the interactions with the supervisor which claimant alleged were stressful, consisted of discipline and termination, which were justified and legitimate personnel actions under the facts presented, the Board should have affirmed the judge's decision denying the claim. 32 BRBS 134, 139-140.

[7] These interactions included the supervisor speaking to her in a harsh voice and one incident of touching her shoulder.

It is noteworthy that the Board in criticizing the dissent stated "a focus on whether the supervisor's actions were legitimate or justified suggests our colleagues would require the supervisor to be at fault in order for the claimant to have a viable claim. Workers' compensation, however, rests on strict liability for work-related injuries. Thus, tort concepts like fault and negligence do not apply." 32 BRBS 134, 137 n. 5. However, it is the Board's decision in *Marino* and not the *Sewell* dissent that has introduced concepts of fault into the analysis of psychological injuries alleged to be the result of solely legitimate personnel actions.

In addition, as the dissent points out, the Board's decision blurred the principle established in *Marino* because the *Marino* claimant's complaints of stressful work conditions were unrelated to the personnel action, whereas, the stressful work conditions alleged by the *Sewell* claimant were related to the personnel actions. 32 BRBS 139-142. Read together, the effect of the Board's *Marino* and *Sewell* decisions is that a claimant alleging a psychological injury resulting from what an Employer alleges is a legitimate personnel action may still prevail, if the claimant can show either that the personnel action was not legitimate, or that, irrespective of the legitimate personnel action, that general work conditions, *i.e.* stressful conditions, even those that may be related to or flow from the legitimate personnel action, existed and contributed to the psychological injury.[8]

With regard to a mental injury in the present case, the Claimant argues that his depression or mental injury did not arise solely from the Employer's legitimate personnel decision to appoint Mr. Judish rather than the Claimant to the leadman role.[9] Cl. Br. at 13. The Claimant testified that in the four days following the selection of Darryl Judish as leadman, his co workers and subordinates made several comments to him over four days such as "we're going to have to check with Darryl on that" or "does Darryl know you're going to do that" which he perceived as questioning his authority. TR 68-69. He indicated he was humiliated and demoralized. The Claimant's statements in this regard were not contradicted and I find the statements credible. Although the Claimant stated that he now realizes his coworkers and subordinates were not attempting to hurt him, it does not negate the effect the comments have had on the Claimant. His treating psychiatrist stated that being passed over for the leadman role and to a lesser extent being heckled by co-workers who believed he no longer had the authority he once possessed were significant factors in development of his depression. CX 4 at 16, 39-40. Putting aside the legitimate personnel action, and applying the principles set forth in the *Marino* and *Sewell* decisions, I find that the reaction of his co-workers to the Claimant's non-selection as leadman over a four day period, humiliated and embarrassed the Claimant, and were working conditions which contributed to stress and played a role in his depression.[10]

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[8] The Employer's brief does not discuss the Board's *Sewell* decisions.

[9] No evidence was presented to establish that the selection of Mr. Judish rather than the Claimant for the leadman role was not a legitimate personnel action. Nor does the Claimant make this argument. I find that the selection of Mr. Judish was a legitimate personnel action.

[10] Upon consideration of the evidence, I conclude the testimony and documentary evidence do not support the assertion that the Claimant experienced stress when the Seawolf project was terminated. Cl. Br. at 13. In addition, to the extent that the Claimant suffered stress as a result of not being selected for the superintendent position in 2002 when Mr. Marley retired, that action was a legitimate personnel action and under *Marino* cannot serve as the basis for supporting a psychological injury claim.

The Claimant also contends that the facts in the present matter take his claim outside the parameters of the Board's *Marino* decision. CL. Br. 12-13. First, citing *Cairns v. Mattson Terminals, Inc.*, 21 BRBS 252 (1988), the Claimant argues that claims in which psychological stress results in physical injuries are compensable and he refers to these claims as mental/physical claims.[11] Cl. Br. at 12. Second, relying on *Pietrunti v. Dir. OWCP*, 119 F.3d 1035 (2d Cir. 1997), Claimant asserts that psychological claims which grow out of work-related physical injuries resulting in depression, are compensable under the Act and he refers to these claims as physical/mental claims.[12] *Id.* Although his brief on this point is confusing, the Claimant asserts that he suffered both physical and mental injuries as a result of work related factors including being passed over for the leadman role and the reaction of co-workers and subordinates to that event. Cl. Br. 12-13.

With regard to physical injuries, Claimant contends that he experienced chronic hypertension, rapid heartbeat, EKG changes and chest pains. While the Claimant did experience these symptoms when he was not chosen as leadman, the medical records submitted show that Claimant had been treated for and taken medication for hypertension and high cholesterol for many years prior to 2005. Nevertheless, I credit Dr. Linden's opinion that stress resulting from being passed over for the leadman role exaggerated or aggravated the Claimant's hypertension, requiring the addition of a second medication. CX 3 at 13. An aggravation of a pre-existing condition renders the entire resulting disability compensable. With regard to chest pain, tests showed the chest pain was unrelated to coronary artery disease and appears to be related to anxiety for which the Claimant now takes medication. I find the occasional chest pain is a physical manifestation of the anxiety, a psychological injury or illness. When the Claimant saw Dr. Linden on February 26, 2005, Dr. Linden performed an EKG which showed some changes from an earlier EKG. The EKG was repeated later that day at the Lawrence & Memorial Hospital and the EKG changes had improved. Dr. Linden repeated the EKG on March 7 and the test results showed no further changes. In sum, as a consequence of not being selected to act as leadman in 2005 and his co-workers response, the Claimant's hypertension was aggravated.

The Claimant also contends that he suffered a biological injury to his brain, a catecholamine hypothesis, when certain chemicals produced in the brain are not produced in adequate supply leading to depression. I find this argument unpersuasive. While depression may be the result of a chemical imbalance in the brain, it manifests as and is viewed by the medical establishment as a psychological injury or illness and not as a physical injury.

The Claimant argues further that his claim does not fall within the *Marino* rule because his "mental condition has been aggravated by the physical injury that he suffered as a result of

[11] In *Cairns*, the Board held that physically heavy work and emotional stress could have brought on chest pains (injury) that Claimant experienced while working and that the injury was work-related, even though the claimant had pre-existing arteriosclorosis. 21 BRBS at 256-257. As *Cairns* involved both heavy physical work and emotional stress as contributing factors in claimant's chest pain, the Claimant here overstates the holding.

[12] In *Pietruniti*, the Second Circuit reversed on substantial evidence grounds an administrative law judge's finding that the claimant's depression was not caused by the injury to his right arm. 119 F.3d at 1042-1044. Under *Pietrunti*, psychiatric injuries that result from work-related physical injuries are work-related and compensable under the Act.

physical injuries" citing *Pietruniti*. Cl. Br. at 13. I find this statement confusing and the record citation Claimant cites does not support the assertion that the Claimant's depression has been aggravated by his hypertension or high cholesterol. *See* Cl. Br. at 13.

After considering the evidence, the Claimant has established that working conditions, that is, the teasing reaction of co-workers and subordinates when he was not chosen to act as leadman in 2005, contributed to physical injuries including aggravation of hypertension and psychological injuries of depression and anxiety. I find the Claimant has successfully invoked the Section 20(a) presumption.

The Employer attempts to rebut the presumption first by stating that the Company's personnel action was a legitimate one. EB Br. at 13-15, 22-24. Mr. Alu explained the basis for his decision to select Mr. Judish over the Claimant for the leadman role in 2005. There is no real dispute that the decision to select someone other than the Claimant was a legitimate personnel decision and I have so found. However, as discussed above, the Claimant has presented evidence, which I credited, that work conditions other than Employer's decision not to select him as leadman contributed to his depression.

Next, the Employer asserts that Dr. Harrop's testimony is sufficient to rebut the presumption. EB Br. at 16-17. In this regard, Dr. Harrop opined that the Claimant's depression was not related to his employment for several reasons. First, Dr. Harrop noted that the Claimant had experienced other stressful situations in the past including the loss of his marriage and family, being passed over for the superintendent job in 2002 and he weathered these events without developing depression. Second, Dr. Harrop said that the Claimant acknowledged that it was within a supervisor's discretion to select the leadman. In addition, he stated that the Claimant's depressive symptoms have not improved in the period since he left work, indicating the depression is not work-related. The fact that the Claimant has experienced previous loss in his life and not developed clinical depression does not support Dr. Harrop's opinion. Dr. Harrop acknowledged that the Claimant's work was very important to him, that he had made several personal sacrifices to advance his career, that it was important to the Claimant to be recognized and honored for his work, and that the Claimant believed he was not being recognized or appreciated for his work, yet Dr. Harrop did not explain the role or effect these key factors may have played in development of the Claimant's depression. Additionally, in my view, the fact that the Claimant's symptoms have not improved since he left work does not support a finding that the depression is not work-related, rather, it establishes the severity of the Claimant's illness. Upon consideration of the Employer's evidence, I find the Employer failed to rebut the presumption of causation. As a consequence the Claimant is entitled to compensation benefits under the Act.

E. Nature and Extent of the Injuries

The burden of proving the nature and extent of disability rests with the Claimant. *Trask v. Lockheed Shipbuilding Construction Co.*, 17 BRBS 56, 59 (1980). Disability is generally addressed in terms of its nature (permanent or temporary) and its extent (total or partial). The permanency of any disability is a medical rather than an economic concept. Disability is defined under the Act as an "incapacity to earn the wages which the employee was receiving at the time

of injury in the same or any other employment." 33 U.S.C. § 902(10). Therefore, for the Claimant to receive a disability award, an economic loss coupled with a physical and/or psychological impairment must be shown. *Sproull v. Stevedoring Serv. of Am.*, 25 BRBS 100, 110 (1991). Thus, disability requires a causal connection between a worker's physical injury and his inability to obtain work. Under this standard, a claimant may be found to have either suffered no loss, a total loss or a partial loss of wage earning capacity.

1. *Nature of Disability*

There are two tests for determining whether a disability is permanent. Under the first test, a Claimant's disability is permanent in nature if he has any residual disability after reaching maximum medical improvement. *Trask* , 17 BRBS at 60. The question of when maximum medical improvement is reached is primarily a question of fact based upon medical evidence. *Ballesteros v. Willamette W. Corp.*, 20 BRBS 184 (1988). An administrative law judge may rely on a physician's opinion in establishing the date of maximum medical improvement. *Miranda v. Excavation Constr., Inc.*, 13 BRBS 882 (1981). Under the second test, a disability may be considered permanent if the impairment has continued for a lengthy period and appears to be of lasting or indefinite duration. *Watson v. Gulf Stevedore Corp.*, 400 F.2d 649, 654 (5th Cir.1968) cert. denied 394 U.S. 976 (1969); *Air Am., Inc. v. Dir., OWCP*, 597 F.2d 773, 781-782 (1st Cir. 1979).

The Claimant's treating psychiatrist, Dr. Reich, diagnosed major depression and stated that the Claimant's condition has not improved after several months of treatment. He concluded that the Claimant's reached maximum medical improvement October 1, 2005. In his September 15, 2005 report, Dr. Harrop opined that the Claimant had not reached maximum medical improvement, stating the Claimant was functioning at a much higher rate a year ago, and that improvement back to that level should be expected. Dr. Reich has treated the Claimant's depression with powerful medications over a period of several months and has indicated that the Claimant's condition has not remained static. In contrast, Dr. Harrop evaluated the Claimant once in September 2005, and has not seen the Claimant since then. I credit Dr. Reich's opinion over that of Dr. Harrop because Dr. Reich has seen the Claimant over a period of months giving him a more complete and current understanding of the Claimant's condition. Accordingly, I find that the Claimant's impairment reached permanency on October 1, 2005.

2. *Extent of Disability*

A three-part test is employed to determine whether a claimant is entitled to an award of total disability compensation: (1) a claimant must first establish a prima facie case of total disability by showing that he cannot perform his former job because of job-related injury; (2) upon this prima facie showing, the burden then shifts to the employer to establish that suitable alternative employment is readily available in the employee's community for individuals of the same age, experience and education as the employee which requires proof that "there exists a reasonable likelihood, given the claimant's age, education, and background, that he would be hired if he diligently sought the job"; and (3) the claimant can rebut the employer's showing of suitable alternative employment with evidence establishing a diligent, yet unsuccessful, attempt to obtain that type of employment. *CNA Ins. Co. v. Legrow*, 935 F.2d 430, 434 (1st Cir. 1991);

Air America, Inc. v. Director OWCP, 597 F.2d 773 (1st Cir. 1979); *Am. Stevedores v. Salzano*, 538 F.2d 933 (2nd Cir. 1976); *New Orleans (Gulfwide) Stevedores v. Turner,* 661 F.2d 1031 (5th Cir.1981).

All of the medical experts agree that the Claimant is unable to work and totally disabled as a result of his depression.[13] Accordingly, I find that the Claimant's impairment is total.

F. Compensation Due

Based on the foregoing findings, the Claimant is entitled to permanent total disability compensation benefits from October 1, 2005 to the present and continuing pursuant to Section 8(a) of the Act at the maximum compensation rate of $1073.64 in effect on October 1, 2005. The Claimant is entitled to annual cost of living adjustments.

G. Interest

Since compensation was not timely paid in this case, I find that the Claimant is entitled to interest on his unpaid compensation. *Foundation Constructors v. Dir., OWCP*, 950 F.2d 621, 625 (9th Cir.1991) (noting that "a dollar tomorrow is not worth as much as a dollar today" in authorizing interest awards as consistent with the remedial purposes of the Act). See also *Quave v. Progress Marine,* 912 F.2d 798, 801 (5th Cir.1990), *reh'g denied* 921 F. 2d 273 (1990), *cert. denied*, 500 U.S. 916 (1991). The appropriate interest rate shall be determined pursuant to 28 U.S.C. § 1961 as of the filing date of this Decision and Order with the District Director.

H. Medical Care

Under Section 7 of the Act, a claimant who suffers a work-related injury is entitled to reasonable and necessary medical treatment. 33 U.S.C. §907(a); *Dupre v. Cape Romain Contractors, Inc.*, 23 BRBS 86 (1989); *Pernell v. Capitol Hill Masonry,* 11 BRBS 532, 539 (1979). I have determined that the Claimant's depression and anxiety are related to his work at Electric Boat. The Claimant is, therefore, entitled to medical care for the condition. Accordingly, I conclude that the Employer shall pay the Claimant for medical expenses reasonably and necessarily incurred as a result of the Claimant's work-related psychiatric condition. *Colburn v. General Dynamics Corp.*, 21 BRBS 219, 222 (1988).

I. Attorney Fees

Having successfully established his right to compensation, the Claimant is entitled to an award of attorney fees under section 28 of the Act. *American Stevedores v. Salzano*, 538 F. 2d 933, 937 (2nd Cir. 1976). Claimant's counsel filed an application for attorney fees and costs totaling $13,685.72. My Order will afford the Employer 15 days from the entry of Decision and Order to file any objection.

J. Conclusion

[13] There is no evidence that the Claimant's hypertension alone would preclude employment.

In sum, I have found that the Claimant's psychological injury is related to his employment at Electric Boat and that he is entitled to compensation under the Act. The Claimant is entitled to permanent total disability benefits beginning October 1, 2005 to the present and continuing until further order.

IV. ORDER

Based upon the foregoing Findings of Fact and Conclusions of Law and upon the entire record, including the parties' stipulations, the following order is entered:

1) The Employer shall pay directly to the Claimant, permanent total disability pursuant to 33 U.S.C. § 908(a) of the Act beginning October 1, 2005 at the maximum compensation rate of $1073.64 in effect on that date. The Claimant is entitled to annual cost of living adjustments beginning October 1, 2006;

2) The Employer shall furnish the Claimant with such reasonable, appropriate and necessary medical care and treatment as the Claimant's employment-related psychiatric condition may require pursuant to 33 U.S.C. § 907;

3) The Employer shall have fifteen days from the date this Decision and Order are served by the District Director to file any objections to the Claimant's attorney fee application;

4) All computations of benefits and other calculations provided for in this Order are subject to verification and adjustment by the District Director.

SO ORDERED.

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COLLEEN A. GERAGHTY
Administrative Law Judge

Boston, Massachusetts